Yeoh v Chew

HIGH COURT (IPOH) — DIVORCE APPLICATION NO 33–34 OF 2001
ABDULL HAMID EMBONG J
27 SEPTEMBER 2001

Family Law *— Divorce — Jurisdiction — Marriage not solemnized according to Law Reform (Marriage and Divorce) Act 1976, effect of — Whether marriage exists — Whether court authorized to make decree of divorce*

To commemorate their so-called marriage union, the parties organized a dinner function held at a temple. Their marriage had not, to date, been registered. There was also no evidence that their marriage had been solemnized pursuant to s 24 of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). The wife sought for a divorce. The issue for determination was whether the court was authorized to make a decree of divorce where the solemnization of the customary marriage itself was not performed as statutorily required.

Held, dismissing the petition:

(1) Section 48 of the Act empowers the court to make a decree of divorce where the marriage has been registered or deemed registered under the Act. This can only happen where the marriage, whether under customary rites or a civil one has been properly solemnized. In the present case, there was no solemnization in accordance with s 5(4) of the Act. It was a non-marriage from the start for which this matrimonial court could not exert its jurisdiction. The court was therefore not seized of any authority to make the decree sought for (see p 380F–G).

(2) The remark on s 34 of the Act made by the Court of Appeal in *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 was merely obiter and made merely in passing in its finding on whether a 'wife' under s 7(2) of the Civil Law Act 1956 could also include a wife to an unregistered marriage contracted under customary law. The comments made on s 34 of the Act in *Joremi Kimin*'s case should be confined to the facts of that particular case and thus not an apt authority to support this instant application (see p 380C–D); *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 distinguished.

[Bahasa Malaysia summary

Bagi memperingati apa yang dianggap perkahwinan mereka, pihak-pihak telah mengadakan satu jamuam malam di sebuah kuil. Perkahwinan mereka, sehingga tarikh ini, tidak didaftarkan. Tiada juga sebarang keterangan yang perkahwinan mereka telah diupacarakan mengikut s 24 Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ('Akta tersebut'). Si isteri telah

memohon untuk penceraian. Isu untuk ditentukan adalah sama ada mahkamah diberi kuasa untuk membuat dikri penceraian di mana pengupacaraan perkahwinan secara adat tersebut tidak dilaksanakan seperti yang dikehendaki oleh peruntukan undang-undang.

Diputuskan, menolak permohonan tersebut:

(1) Seksyen 48 Akta tersebut memberikan kuasa kepada mahkamah untuk membuat satu dekri perceraian di mana perkahwinan tersebut telah didaftarkan atau dianggap telah didaftarkan di bawah Akta tersebut. Ini hanya boleh berlaku di mana perkahwinan tersebut, sama ada di bawah upacara adat atau sivil telah diupacarakan dengan betul. Di dalam kes sekarang, tiada upacara dilangsungkan menurut s 5(4) Akta tersebut. Tidak wujud sebarang perkahwinan dari mula lagi di mana mahkamah perkahwinan ini boleh menggunakan bidang kuasanya. Mahkamah oleh itu tidak diberi apa-apa kuasa untuk membuat dekri yang dipohon (lihat ms 380F–G).

(2) Komen tentang s 34 Akta tersebut yang dibuat oleh Mahkamah Rayuan dalam *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 hanyalah obiter dan dibuat hanya sepintas lalu dalam penemuannya tentang sama ada seorang 'isteri' di bawah s 7(2) Akta Undang-Undang Sivil 1956 boleh juga termasuk seorang isteri kepada satu perkahwinan yang tidak didaftarkan yang mengikat di bawah undang-undang adat. Komen-komen yang dibuat di bawah s 34 Akta tersebut dalam kes *Joremi Kimin* hendaklah terbatas kepada fakta-fakta kes tertentu dan oleh itu bukan satu autoriti yang sesuai untuk menyokong permohonan sekarang ini (lihat ms 380C–D); *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 dibeza.]

Notes

For cases on jurisdiction of court to decree divorce, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2479–2493.

Cases referred to

Joremi Kimin & Anor v Tan Sai Hong [2001] 1 MLJ 268 (distd)
T v O [1993] 1 MLJ 168 (refd)

Legislation referred to

Civil Law Act 1956 s 7(2)
Law Reform (Marriage and Divorce) Act 1976 ss 4, 5(4), 7, 9, 10, 11, 12, 22(1)(c), (3), 24(1), (2), 27, 28, 34, 48, 75(2), 109, Parts III, IV, Forms B, G, H, I
Penal Code s 494

A *R Naidu* (*Ng Choo Beng, R Naidu & Partners*) for the petitioner.
Tan Hai Hong (*GH Lim Tai Tan & Partners*) for the respondent.

Abdull Hamid Embong J:. The sole issue for determination of this court is whether the parties to an unsolemnized and unregistered customary marriage entered into after the coming into force of the Law Reform
B (Marriage and Divorce) Act 1976 ('the Act') can seek for the reliefs sought; which are:

(1) that the said marriage be dissolved;

(2) that the custody, care and control of their child shall be given to the petitioner;

C (3) the respondent shall have access to the said child during weekends?

(4) that the cost of this petition be borne by the respondent;

(5) further or such other relief as this honourable court deems fit and proper.

D To commemorate their so-called marriage union, the parties organized a dinner function held at a temple in Teluk Intan on 22 February 1998. They have since cohabited as husband and wife and from that union, have a child born on 21 May 1998, a mere three months after the ceremony. Their marriage has not, to date, been registered. There is also no evidence (save for a dinner invitation card) that their marriage had been solemnized
E pursuant to s 24 of the Act. They also did not produce the Marriage Register in Form I as proof of solemnization and registration of their marriage. The wife now asks for a divorce, the respondent husband does not oppose her application.

F *The scheme under the Act*

The objective of the Act is to provide for a scheme which may be discerned from its long title, namely:

> An act to provide for *monogamous marriages* and *solemnization* and *registration* of such marriages, to amend and consolidate the law relating to divorce and
G to provide for matters incidental thereto. (Emphasis added.)

The Act repealed a dozen written laws (see s 109) in existence prior to its coming into force — as can be seen in the schedule. The Act recognizes only monogamous marriages as described under part II and makes it an offence for a person lawfully married to marry again during the lifetime of his or her
H spouse (see s 7 of the Act punishable under s 494 of the Penal Code).

Part III of the Act provides for the restrictions on a marriage. It starts with s 9, which states:

> A marriage under this Act may be solemnized only by a Registrar.

Note the use of the qualifying word 'only' in that section to emphasize that
I only a registrar may solemnize a marriage. The Registrar of Marriages is a public officer appointed by the Minister under s 28 of the Act. The Minister may also appoint any person whether a public officer or not to be an

assistant registrar. Part III also provides for certain prohibitions for contracting a valid marriage, based either on age, degrees of consanguinity and affinity and for the requirement of consent of either parent for one below 21 years old to contract into a marriage, (see ss 10, 11, 12 of the Act respectively).

Section 22 of the Act deals with the solemnization of marriages. A church or temple marriage may be held at such time as is permitted by the religion or custom. A registry marriage however can only be conducted in the office of a registrar with open doors and within the hours of six in the morning and seven in the evening. Again, public policy requires marriages to be transparent and not held in secret. As for church or temple marriages, s 22(3) of the Act provides as follows:

> A valid marriage may be solemnized under sub-s (1)(c) by an assistant registrar if he is satisfied by statutory declaration that:
>
> (a) either —
>
> (i) each of the parties is twenty-one years of age or over, or, if not, is a widower or widow, as the case may be, or
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> (ii) if either party is a minor who has not been previously married and the female party not under the age sixteen years that the consent of the appropriate person mentioned in s 12 has been given in writing, or has been dispensed with, or has been given by a court in accordance with s 12;
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> (b) there is no lawful impediment to the marriage;
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> (c) neither of the parties to the intended marriage is married under any law, religion, custom or usage to any person other than the person with whom such marriage is proposed to be contracted; and
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> (d) in so far as the intended marriage is a Christian marriage and is to be solemnized in accordance with the rites, ceremonies or usages of a Christian religious denomination, the provisions of the canons of such religious denomination relating to the publication of banners or the giving notice of the intended marriage have been complied with or lawfully dispensed with in accordance with such canons.

More pertinently, for the purpose of this judgement, sub-s (4) requires the delivery of a statutory declaration in order to validate a marriage under sub-s (3), above.

Section 22(1)(c) of the Act speaks of the solemnization of marriages in places other than a registrar's office. It says:

> … in a church or temple or at any place of marriage in accordance with section 24 at any such time as may be permitted by the religion, custom or usage which the parties to the marriage or either of them profess or practise.

Section 24 of the Act further amplifies the requirement abovementioned.

It says:

> Solemnization of a marriage through religious ceremony, custom or usage
>
> (1) Where any clergyman or minister or priest of any church or temple is appointed by the Minister to act as assistant registrar of Marriages for any marriage district, such clergyman or minister or priest may after delivery to him of a statutory declaration under sub-s (3) of s 22 solemnize any

A marriage, if the parties to the marriage or either of them profess the religion to which the church or temple belong in accordance with the rites and ceremonies of that religion.

(2) Where any person is appointed by the Minister to act as assistant registrar of Marriages for any marriage district such person may after delivery to him a statutory declaration under subsection (3) of s 22 solemnize any B marriage in accordance with the custom or usage which the parties to the marriage or either of them practise.

(3) An assistant registrar solemnizing a marriage under this section shall in some part of the ceremony remind the parties that either of them shall be incapable during the continuance of the marriage of contracting a valid marriage with any other person and if either of them shall marry during C the continuance of the marriage he or she shall commit an offence.

(4) In this section

'priest of a temple' includes any member of a committee or management or governing body of that temple and any committee member of any religious association;

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'priest of a church' includes any officer or elder of the church.'

Thus, for a religious or customary marriage, its solemnization can only be effected upon satisfaction of two conditions. Firstly, the person solemnizing the marriage, be he a religious official of a church or temple or any other E person must have been appointed by the Minister as an assistant registrar. Secondly, there must have been delivered to the assistant registrar a statutory declaration either under s 24(1) of the Act or if the marriage is not a religious ceremony, under s 22(3) of the Act. The assistant registrar solemnizing the marriage shall also remind the parties, during the solemnization ceremony that it is an offence for the parties or either of them F to contract into a polygamous marriage. This is to emphasize that after the coming into force of the Act on 1 March 1982, the law, for the purposes of this Act, no longer gives legal recognition to secondary wives under Chinese custom. The application together with the requisite statutory declaration to marry according to religious or customary rites is made under Form G as G provided under the Rules (made under the Act).

Chinese customary marriages

The Chinese community in this country until today has always recognized as good wedlock of parties who have undergone the customary tea H ceremony. In fact it would not be wrong to say that some amongst the Chinese would not even acknowledge that a couple, although already solemnized and registered as husband and wife under the Act, is married if they have not submitted themselves to this obligatory ritual. The tea ceremony itself is simple yet solemn and meaningful. It involves, firstly with the groom and bride going to the bride's parents' home. They would then I serve tea to the bride's elders including her deceased ancestors, within her immediate family. Additionally, money gifts or ang pows may be handed over by the couple to immediate family members who are younger than the

bride. The couple may also receive gifts from the bride's parents. The whole procedure would then be repeated when the couple pay their respects to the groom's parents. The purpose of the whole exercise is to mark the couple's acceptance as a kindred member of their respective in-laws' family. In my view, it is also a quaint way of introducing to your family and kin your choice of a spouse.

Now, for the purpose of the Act, this customary rite alone, however recognizable and acceptable is insufficient to clothe it with legal validity for no matrimonial court will recognize a tea ceremony per se performed after 1 March 1982, as a marriage. As such, Chinese couples intending to get married nowadays will either solemnize and register their marriages at either the registrar's office or at a temple or at a Buddhist or a clan association premise as provided under s 22 of the Act. The registrar or an assistant registrar (who may or may not be a religious personage) will require the parties to submit the National Registration Department form, ie Borang JPN KC02 the contents of which includes the legal requirements of the statutory declaration as laid down under ss 22 and 24 of the Act. Form JPN KC02 is almost similar to Form G under the Act with the declarations as found in Form B and Form H added in. JPN KC02 is in fact a common form which may be used for the solemnization of a marriage by an assistant registrar in a marriage according to religious or customary rites or a marriage solemnized in a foreign country. Upon solemnization of the marriage, the registrar or an assistant registrar (in cases where the marriage is solemnized at a temple or an association) will immediately issue a marriage certificate, known as the marriage register as provided under Form I of the Act.

The need to regulate monogamous marriages according to customary rites under the Act can be discerned from the following explanatory statement on ss 22 and 24 of the Act as found in the Bill.

> The Joint Select Committee received recommendations from Buddhists, Hindus and Sikhs. They generally supported monogamy, but they claimed that monogamous marriages should not necessarily follow strictly the civil marriage ceremony as recommended by the Royal Commission. Buddhists, Hindus and Sikhs attach importance to the religious rites and ceremonies and they therefore appealed that their religious form of marriage should be recognized for the purpose of the proposed law. The Select Committee recommended the proposed law should so provide, (Clauses 22 and 24).

Part IV deals with the registration of marriage s 27 of the Act provides that:

> The marriage of every person ordinarily resident in Malaysia and of every person resident abroad who is a citizen of or domiciled in Malaysia after the appointed date shall be registered pursuant to this Act.

It can be seen from the brief outline of the relevant parts of the Act above, that the law only recognizes a monogamous marriage contracted pursuant to the scheme of the Act. With the coming into force of the Act on 1 March 1982, a marriage, to be lawfully recognized, may be solemnized only in accordance to the provisions under Part III. Section 5(4) of the Act clearly states:

> After the appointed date, no marriage under any law, religion, custom or usage may be solemnized except as provided in Part III.

No one can therefore come before a matrimonial court stating that he or she is lawfully married by way of custom if it cannot be shown that the solemnization of that marriage is in accordance with Part III of the Act, for otherwise, it would make the Act otiose and bring back the era of disarray for which the Act purports to regulate. Secondary wives may then appear aplenty.

Subsisting marriages that are solemnized prior to the appointed date but not registered are deemed as registered and shall continue to be valid marriages until dissolved (see s 4 of the Act).

Thus, under the Act, a customary marriage can be solemnized only by an appointed assistant registrar under s 24(2) of the Act upon being satisfied by way of a statutory declaration that the marriage is in accordance with the custom which the parties or either of them practised.

Section 22(4) of the Act provides for the mandatory requirement, that regulates a valid marriage post the Act. It states:

> (4) Every marriage purported to be solemnized in Malaysia shall be void unless a certificate for marriage or licence has been issued by the Registrar or Chief Minister or a statutory declaration under sub-s (3) has been delivered to the Registrar or assistant registrar, as the case may be.

It has been held in *T v O* [1993] 1 MLJ 168 that a failure to comply with that requirement would render a marriage *void ab initio* and that such a marriage cannot be termed as a monogamous marriage as contemplated under the Act. I agree with the learned judge in that case, when he called such a marriage as a non-event.

Learned counsel for the petitioner here referred to the case of *Joremi Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268, a case on dependency claim under s 7(2) of the Civil Law Act 1956 ('the CL Act'), more specifically on the meaning of the word 'wife' in that section. Although the validity or otherwise of a customary marriage was not in issue in that case, the Court of Appeal, in passing touched on the effect of s 34 of the Act and formed this view:

> In this appeal before us, the learned judge relied on s 34 in order to overcome the difficulty of the invalidity of the customary marriage on ground of non-compliance with the provisions of the Act including non-registration of the customary marriage of the parties. He held that by virtue of s 34 the customary marriage between the respondent and the deceased was valid and it should not be declared invalid because it was not registered. This was on the premise that registration is merely a formality and the true essence and substance of the Act as stated in the preamble is to provide for monogamous marriage and there is nothing to show that the marriage between the respondent and the deceased was not a monogamous one.

The Court of Appeal also opined that if the learned judge in *T v O* had considered s 34 of the Act, the result may have been different. In coming to its finding, the Court of Appeal however was not opportuned to comment

on Part II of the Act (which was not an issue before it), in particular to s 5(4) of the Act which now recognizes only a marriage solemnized pursuant to Part III of the Act.

Section 34 of the Act speaks of the legal effect of registration. It states:

> Nothing in this Act or the rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered.

Thus in my view, an invalid marriage by reason of non-solemnization, such as the one found in this case cannot be rendered valid merely because it was not registered. The very solemnization of this purported marriage itself was in question as it had not complied with s 5(4) of the Act. It was a non-marriage from the start, for which this matrimonial court could not exert its jurisdiction.

In my view, that remark on s 34 of the Act made by the Court of Appeal was merely obiter and, with greatest respect, made merely in passing in its finding on whether a 'wife' under s 7(2) of the CL Act could also include a wife to an unregistered marriage contracted under customary law. Indeed this qualification was made by the Court of Appeal in coming to its decision. As such, this court respectfully feels that the comments made on s 34 of the Act in *Joremi Kimin*'s should be confined to the facts of that particular case and thus not an apt authority to support this instant application.

The matter before me is concerning the reliefs sought for under the Act ie for a decree of divorce and for ancillary reliefs as available to the parties. The issues for determination is whether this court is authorized to make a decree of divorce where the solemnization of the customary marriage itself was not performed as statutorily required. Section 48 of the Act empowers this court to make a decree of divorce where the marriage has been registered or deemed registered under the Act. This can only happen where the marriage, whether under customary rites or a civil one has been properly solemnized. As stated earlier, the customary marriage that is now under consideration is actually a non-marriage. It is thus void ab initio and cannot by any means be conferred a status of valid matrimony. This court is therefore not seized of any authority to make the decree sought for. Fortunately, the Act has made provisions for safeguarding the legitimacy of a child born to such marriages. Section 75(2) of the Act provides that the child shall be treated as legitimate if, as in this case, either parties reasonably believed that the marriage is valid.

This petition is therefore dismissed with no order as to costs.

Petition dismissed.

Reported by Jafisah Jaafar